IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN

TUESDAY, THE 12TH DECEMBER 2006 / 21ST AGRAHAYANA 1928

WP(C).No. 33050 of 2006(H)

PETITIONER:

E.K. MOIDEENKOYA, S/O.KOYAKUTTY,
MEPRAMBATH HOUSE, TENHIPALAM P.O.,
TIRURANGADI, MALAPPURAM DISTRICT.

BY ADV. SRI.K.MOHANAKANNAN
SMT.A.R.PRAVITHA

RESPONDENTS:

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1. THE DEPUTY COMMISSIONER (APPEALS)
COMMERCIAL TAXES, ERNAKULAM.

2. SALES TAX OFFICER, WORKS CONTRACTS &
LUXURTY TAXES, MALAPPURAM.

3. THE DISTRICT COLLECTOR, MALAPPURAM.

4. THE DEPUTY TAHSILDAR
(ARREAR COLLECTION) TALUK OFFICE,
TIRURANGADI.

GOVT. PLEADE3R SRI. SOJAN JAMES.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12/12/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R. RAMAN, J.

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W.P.(C) 33050/2006

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DATED THIS, THE 12TH DAY OF DECEMBER, 2006.

J U D G M E N T

Petitioner is a contractor. The nature of the work entrusted with him is the work of trenching and laying cables supplied by B.S.N.L. As such, there is no transfer of goods assessable to duty under the Kerala General Sales Tax Act. Petitioner filed annual returns for the years 2000-01 and 2001-02 and according to him, the awarder has already deducted the amount of tax payable and therefore, he has no further liability to pay any tax. The assessing officer, however, rejected his contention and estimated the turnover. Before completing the assessment, notice was issued. The assessee did not file any objection. But according to the assessee he has already opted to pay tax at compounded rate which was not allowed. Assessments were thus completed and the balance tax was determined as per Exts. P1 and P2 assessment orders for Rs. 4,43,564/- and Rs. 2,59,835/- respectively. Petitioner preferred appeals Exts.P3 and P4 before the first respondent along with applications for stay as evidenced by Exts.P5 and P6. As per Ext.P8 order passed in the stay applications,

petitioner was granted stay subject to the condition that he shall pay 50% of the balance tax demand due for those years and furnish security before the assessing authority on or before 16.12.2006 for the balance amount. Petitioner impugns Ext.P8 order in this writ petition.

2. Heard the learned Government Pleader also. Placing reliance on the decision of this Court in **M.V.R. Industries Ltd. v. Intelligence Officer ((2003) 133 STC 93)** it was contended that the appellate authority has passed the impugned order in a mechanical way by merely referring to the contentions raised by petitioner. According to him, the nature of work entrusted to him is only a labour contract for digging and laying cables for which cable is supplied by B.S.N.L. and the only other goods involved in the operation is bricks used to cover the cables for identification purposes. As such only the value of bricks if at all could be assessed for the purpose of sales tax and no other part of the contract other than the value of the said goods could be said to be a transfer of goods attracting exigible to tax under the Kerala General Sales Tax Act. It is also contended that though he has requested for compounding the case for the two years, since the authorities did not pass any orders thereon that will not preclude him from contending regarding his non liability to pay tax since if Section 7(7) is not applicable,

the only provision under which tax is assessable is Section 5 and necessarily tax can be assessed only where there is a transfer of goods is involved . According to him, the order passed in a mechanical way, without considering any of these contentions and the balance of convenience, hence liable to be set aside.

3. The learned Government Pleader appearing on behalf of the State would submit that a reading of Ext.P8 order will show that the petitioner is disputing the rate of tax and he having filed an application for compounding and also filed a declaration, cannot thereafter raise such contentions.

4. It is true that the petitioner would have applied for compounding. But the assessment is made based on the return filed and after rejecting the same and after making an assessment on best judgment basis, tax is imposed under Section 5 of the Act. Therefore, necessarily, the assessing authority would have to be satisfied dehors the request for compounding as to what part of the amount received pertains to the transfer of goods and the value of the goods liable to be taxed. Since the contention as raised by the petitioner has not been considered by the appellate authority and since he has passed an order mechanically, it has to be found that Ext.P8 is vitiated. It has time and again been held by this Court in number of

decisions that while considering the stay application, the prima facie case, if any of the appellant, balance of convenience, the hardship that may be caused in insisting for payment etc. have to be taken note of before imposing any condition. Since none of these factors was seen considered by the appellate authority while passing the order impugned, the said order is liable to be set aside. I do so. The appellate authority shall pass fresh orders after hearing the petitioner within a period of three weeks from the date of production of a copy of this judgment. Recovery proceedings, if any, pending against the petitioner pursuant to the assessment order will be kept in abeyance for the above period and thereafter, the matter will be governed by any orders that may be passed by the appellate authority.

The writ petition is disposed of as above.

P.R. RAMAN,
(JUDGE)

knc/-